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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1968.

No. 653

EMMOGENE SNYDER PRESCOTT,
Petitioner,

vs.

SHELL OIL COMPANY, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals for the Sixth Circuit.

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INDEX.

	Page
Prayer	1
Jurisdiction	2
The question presented	3
Statement of the case	4
Argument	7
Relief	23
Appendix A—Ruling on motion for summary judgment	25
Appendix B—Opinion filed in U. S. District Court March 23, 1967	27
Appendix C—Final judgment filed April 4, 1967	29
Appendix D—Notice of appeal	31
Appendix E—Opinion of Sixth Circuit Court of Appeals decided July 23, 1968	32
Appendix F—Judgment of Sixth Circuit Court of Appeals	38

Cases Cited.

Adams et al. v. Helburn, 198 Kentucky 546	11
Adams v. Willis, 225 S. C. 518, 83 S. C. 2d 171	20
Butler et al. v. Richardson, 60 Atlantic 2d 718	18
Harding v. Gibbs, 125 Illinois 85	8
Imperial Refineries Corporation v. Lila Morissay, 119 S. W. 2d 872	14, 15

Manasse et al. v. Ford et al., 58 California Appeals 312 9

Northwest Racing Association v. William Hunt and Virginia Daley, Executors of the Last Will and Testament of George E. Hunt, deceased, 20 Illinois Appeals 2d 393 .....13, 14

Shell Oil Company, Inc. v. Blumberg, et al., 154 Federal Reporter 2d 251 .....2, 3, 12

Sinclair Refining Company, et al. v. Allbritton, et al., 218 S. W. 2d 185 .....19, 20

Sinclair Refining Company v. Clay, et al., 102 Fed. Supl. 732 20

Texaco, Inc. v. Louis B. Rogow, 190 Atlantic Reporter 2d 48 15

Texts Cited.

Corbin on Contracts (1950), Sec. 261 7

Vol. 8, A. L. R. 2d 7

51 C. J. S., "Landlord and Tenant," Sec. 232 23

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Emmogene Snyder Prescott, prays that a writ of certiorari issue to review the judgment and decision of the United States District Court for the Western District of Tennessee, Western Division, rendered in this cause by the official opinion filed on March 23, 1967 (App. pp. 27-30). Said judgment was based on the oral ruling of February 3, 1967, by the Honorable Robert M. McRae, Jr.,

which was reduced to writing (App. pp. 25, 26). The final judgment was filed in the United States District Court on April 4, 1967 (App. pp. 29, 30). Said judgment was affirmed by the United States Court of Appeals for the Sixth Circuit on July 23, 1968 (App. pp. 32-37), and Judgment entered thereon.

Your petitioner prays that this Court review and reverse the judgment and decisions mentioned herein above.

JURISDICTION.

The final judgment in this cause was entered in the United States District Court for the Western District of Tennessee, Western Division on April 4, 1967 (App. pp. 29, 30), and affirmed by the judgment of United States District Court of Appeals, Sixth Circuit, on July 23, 1968 (App. pp. 32-37).

The jurisdiction of this Court is invoked under Rule 19 (b) of the Rules of the Supreme Court of the United States on the grounds that the decision rendered in this cause (Shell Oil Co., Inc. v. Prescott) is in conflict with the decision of another court of appeals on the same matter. The other decision referred to being Shell Oil Company, Inc. v. Blumberg et al., 154 Federal Reporter 2d 251, decided by the U. S. Circuit Court of Appeals for the Fifth Circuit on March 22, 1946.

Petitioner, Emmogene Snyder Prescott, contends that the facts in her case are the same or very similar to that of the Shell Oil Co., Inc. v. Blumberg case in the following particulars:

1. Both cases involved the interpretation of dual options in a lease contract, that is, a fixed price option and a first refusal option.

2. Both cases involved the first refusal option being exercised first by the lessor putting the lessee on

notice of the proposed purchase of the leased premises by a third party.

3. In both cases, the Shell Oil Co., Inc., attempted to exercise their rights under the fixed price option after being duly notified of the proposed purchase under the first refusal option of the lease agreement.

In the Shell Oil Co., Inc., v. Blumberg case the U. S. District Court of Appeals for the Fifth Circuit affirmed the decision of a lower court and refused to grant specific performance under the provisions of the fixed price option.

In the case at hand, Shell Oil Co., Inc. v. Prescott, the same facts were present as in the Shell Oil Co., Inc. v. Blumberg case but the United States District Court of Appeals for the Sixth Circuit affirmed the decision of the lower court and granted specific performance under the fixed price option.

THE QUESTION PRESENTED.

First and Only Question.

Can Lessor, under a dual option lease contract be required to sell to lessee certain property containing a service station at the fixed price option of $32,500.00 where lessor has, prior to the exercise of said fixed price option, received and notified lessee of a bona fide offer of purchase for $50,000.00 from third party, pursuant to provisions of first refusal option in contract.

The District Court and the United States District Court of Appeals answered this question "yes."

Your petitioner Emmogene Snyder Prescott, contends that the answer is "no."

STATEMENT OF THE CASE.

This case was heard on the pleading and stipulations filed in the cause and all the material facts were stipulated and admitted.

The appellant, Emmogene Snyder Prescott, was the lessor in a written lease agreement with the appellee, Shell Oil Co., Inc. Said lease agreement was prepared on a Shell Oil Company printed form of lease and terminated on April 14, 1966. Said lease contained two paragraphs which are the subject of this suit, to-wit:

> "Thirteenth. At any time during the term of this lease or any extension or renewal, Shell shall have the option to purchase the leased premises, with all appurtenances, improvements and equipment and Lessor's fixtures and personal property thereon, for the sum of Thirty Two Thousand Five Hundred Dollars ($32,500.00) exercisable by notice to Lessor".
>
> "Fourteenth. If at any time during the term of this lease, or any extension or renewal thereof, Lessor receives from a ready, willing and able purchaser a bona fide offer to purchase the leased premises, which Lessor desires to accept, Lessor shall give Shell notice, setting forth the name and address of the prospective purchaser and the price and terms of the proposed sale, accompanied by Lessor's affidavit that such prospective sale is in good faith. Shell shall thereupon, in addition and without prejudice to Shell's rights under Article Thirteenth, have the prior option to purchase said premises and Lessor's improvements, fixtures and personal property thereon from Lessor at said price and terms. If Shell elects to exercise said option, it shall so notify Lessor within twenty-five days after Shell's receipt of the aforesaid

notice of Lessor's desire to sell. Shell's right to purchase under this Article shall be a continuing right during this lease, or any extension or renewal, whenever Lessor, or any successor in title, desires to sell said property. Shell's failure to exercise any option under this Article shall in no way affect this lease, Shell's rights under Article Thirteenth, or its right to the estate herein created".

During the term of the lease, the following events took place:

(1) On March 18, 1966, pursuant to paragraph 14 of the lease, petitioner, Emmogene Prescott wrote the Shell Oil Company, Inc. notifying them that she had a bona fide offer from others to purchase the property for Fifty Thousand Dollars ($50,000.00) and gave Shell Oil Company, Inc., the right of first refusal to purchase at this price.

(2) On April 4, 1966, Shell Oil Company, Inc., wrote to Mrs. Prescott, notifying her that they did not choose to exercise its option under Paragraph 14, but that it did elect to exercise its option under Paragraph 13 to purchase said property at the fixed price option of Thirty Two Thousand Five Hundred Dollars ($32,500.00).

(3) Mrs. Prescott refused to acknowledge Shell Oil Company's right to purchase under Paragraph 13 and Shell Oil Company, Inc. brought this suit for specific performance.

The Shell Oil Company, Inc. filed a motion for a judgment on the pleadings and Emmogene Snyder Prescott, filed a motion for summary judgment.

On February 3, 1967, the District Court, by oral opinion (App. pp. 25, 26) ruled in favor of Shell Oil Company, Inc., holding that they were entitled to specific performance under the lease requiring Mrs.

Emmogene Snyder Prescott to convey the property to them for Thirty Two Thousand Five Hundred Dollars ($32,500.00).

On March 23, 1967, the District Court filed an opinion regarding supplemental relief to the appellee, Shell Oil Company, Inc. (App. pp. 27, 28).

On April 3, 1967, the District Court entered the final judgment in the cause (App. pp. 29, 30).

On April 5, 1967, appellant, Mrs. Emmogene Snyder Prescott, filed notice of appeal (App. p. 31).

The basis for federal jurisdiction in this case was because the amount in controversy exceeded $10,000.00 and Shell Oil Company, Inc. was a non-resident of the State of Tennessee, being a Delaware Corporation.

ARGUMENT.

The answer to the question involved in this cause necessarily involves the interpretation of paragraphs 13 and 14 of the lease agreement which contains the dual option provisions in the contract.

There appears to be no reported cases in Tennessee that are in point, but Vol. 8, A. L. R. 2d, contains a summary of the cases dealing with the incorporation in one instrument of two purchase options relative to the same property. This subject is covered also by Corbin on Contracts (1950), Sec. 261, p. 864, which states as follows:

> "A party may be given an option to buy (or to sell) at a stated price and at the same time a right that there shall be no sale at any price without first being given an option to buy (or to sell) at the price offered by a third person.
>
> "There is no inconsistency between these two provisions; they merely create a power to consummate one contract (the option) and a right that no other contract shall be made without first giving another option on the new terms. Indeed, the second of these is normally to be implied in the first, during the specified option period. The inclusion of the second in express terms may be intended by the parties to create in the option-giver a power to terminate the option at any time before its exercise by making a new offer to the option holder on the terms offered by a third party. If such is the reasonable interpretation, the parties have created (1) an Option to Buy (or sell) at one price; (2) a Right of First Refusal at a second price yet to be determined; and (3) a Power of Termination of the option by actually giving the Refusal."

While there are no reported cases in Tennessee dealing with the dual option question it has long been the rule in

Tennessee that "The right to specific performance in particular case is governed by the ordinary principles of equity, 'Equity, in decreeing specific performance, requires not only that the contract be just and equitable in its provisions, but that the consequences of specific performance likewise be equitable and just. One of the general rules formulated and followed is that this equitable relief will not be granted if, under the circumstances of the case, the result of the specific enforcement of the contract would be harsh, inequitable, oppressive, or result in an unconscionable advantage to the plaintiff, even though the complainant has no intention of taking an unfair advantage, and even though the contract may be valid and enforceable at Law. In every case where a specific performance is asked, the question must be whether the exercise of the power of the court is demanded to subserve the ends of justice, and unless the court is satisfied that it is right in every respect, it will refuse to interfere.' 49 Am. Jur., Section 58, page 72; Moss Tie Co. v. Hill, 191 Tenn. 582; Ring v. Jehl (Tenn. 1967), 421 S. W. 2d 375."

Before the turn of the century, on May 9, 1889, the Supreme Court of Illinois, in the case of Harding v. Gibbs, 125 Illinois 85, decided this question by holding in favor of the lessor and had the following comment to make in reversing the lower court:

> "The parties to a lease endorsed upon it an agreement that the lessee should have the privilege of purchasing the premises during the first year, on certain terms therein stated; but that if the lessor should have an offer for the property, 10 days' notice thereof should be given to the lessee, who should have the privilege of selling. Within the year the lessor sold the property, and after the deed was given notice of the offer signed by the lessor was served on the les-

see, who made no election of purchase. Held, that this terminated the lessee's option, and that he could not thereafter maintain a suit for specific performance."

"The terms of the agreement required the notice to be given by Smith, as it was; but, whether given by Smith or Harding, Gibbs knew there was a chance to sell the land, and his plain duty under the agreement was to exercise his option at once within the 10 days, and not let pass the opportunity to make a sale of the land. He could not consistently with any principle of fair and honest dealing, under the contract which he had made, destroy the opportunity of making a sale, wait until the expiration of the year to see if there might not be an increase in value of the land, and then exercise his option to purchase. We conceive, too, that Smith had the right, under the agreement, to give the notice, in order to protect his interest under the agreement. If only the purchaser from him, where there had been a sale, could give the notice, then, on the purchaser's omission to give the notice, Smith might lose the benefit of such sale, as Gibbs could avoid it by the exercise of his option thereafter.

The decree of the superior court will be reversed, and the cause remanded for further proceedings in conformity with this option."

On June 26, 1922, the District Court of Appeals, Third District, California, in the case of Manasse et al. v. Ford et al., 58 California Appeals 312, the Court decided the question in favor of the lessor. In this case lessor found a bona fide purchaser for the sum of $9,500.00, and he thereupon gave to the respondents a written notice required by the terms of said contract.

The respondents failed for more than 30 days to purchase the property and thereafter the lessor sold the prop-

erty to the appellants for the sum of $9,500.00. Notwithstanding the provisions of the proviso, the respondents claimed the right to purchase the property from the appellants. They based their contention upon the following clause:

> " 'The Lessor may sell the same subject to this lease and this lease, the conditions, restrictions and covenants thereof shall then be in full force and effect and binding upon the lessee and the purchaser of the said property.' "

The trial court decided this case in favor of the respondents, but the District Court of Appeals reversed the trial court and in so doing made the following statement:

> "The trial court rendered judgment in favor of the respondents and found, in effect, that they continued after the sale to have the same rights of purchase of the property as though the proviso had never been incorporated in the lease. The court, in so doing, however, disregarded one of the leading statutory canons of interpretation. This is that some effect must be given to each and every provision of a contract, if this can be done without doing violence to the language used by the parties.
>
> "The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other."
>
> "A contract must receive such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if it can be done without violating the intention of the parties."
>
> "However broad may be the terms of a contract, it extends only to those things concerning which it appears that the parties intended to contract."
>
> "Particular clauses of a contract are subordinate to its general intent."

"Repugnancy in a contract must be reconciled, if possible, by such an interpretation as will give some effect to the repugnant clauses, subordinate to the general intent and purpose of the whole contract."

"There is no repugnancy in the terms of the contract, but if there were an effort should be made to give some effect to every part of it. Moreover, it must receive such an interpretation as will avoid absurdities and particularly such an interpretation as will not serve to excise any of its provisions."

On February 23, 1923, the Court of Appeals for the State of Kentucky in the case of Adams et al. v. Helburn, 198 Kentucky 546, dealt with this same subject matter and decided the case in favor of the lessor. The lower court decided this case in favor of the lessor, and the Court of Appeals affirmed and in so doing had the following comments to make:

"A lease giving the tenant the option to purchase the leased premises at a stated price, and further providing that, if lessor had an offer for the purchase of the property, he should give the lessee the privilege of purchasing it at the figure offered, gives the lessee the option of buying at the fixed price only if he exercised that option before the lessor received an offer which he desired to accept, after which the lessee had the option of purchasing at the figure offered, whether that might be more or less than the fixed price, so that the lessee could not purchase at the fixed price after he was notified the lessor had an offer of double that price."

"It is the contention of appellants that the contract gave to them an option to buy the property at $25 a front foot a any time during the year 1919, and also an option, as a preferred vendee, to purchase it at less than $25 a front foot, if the lessor, during the year,

received an acceptable offer of less than that amount. Appellee contends that appellants had the right to exercise their option and take the property at $25 a front foot, but if they failed to exercise the option before appellee received a larger offer that he was willing to accept, then upon giving appellants notice of the larger offer their option was limited to taking the property at that price.

(1) The question is one of construction. The language of the two paragraphs is not as clear as it might be, but we construe it to mean that appellant had the option of buying the property at $25 a front foot, but, if they failed to exercise that option before appellee received an offer that he desired to accept, appellants then had the option of purchasing 'at the figure offered', whatever that might be, whether less than $25 a front foot or more than the amount. That was the view of the trial court, and in our judgment it is correct."

On March 22, 1946, the Circuit Court of Appeals for the Fifth Circuit in the case of Shell Oil Company, Inc. v. Blumberg, et al., 154 Federal Reporter 2d 251; the lower court in this case decided the matter in favor of the lessor and the Fifth Circuit Court of Appeals affirmed the lower court's decision and in so doing had the following to say:

"Where first paragraph of lease gave lessee option to purchase leased property for $10,000, and second paragraph gave lessee option to purchase property upon terms offered by prospective purchaser, and last clause provided that lessee's failure to exercise any option should not affect lessee's right in estate created, lessee's right to purchase property for $10,000 terminated with rejection of lessor's offer to sell for amount offered by prospective purchaser and thereafter lessee's rights were under the second paragraph.

Lessee given first privilege of purchasing leased premises must, after notice from lessor of receipt of bona fide offer, elect to exercise lessee's privilege in accordance with terms of lease or the right is lost."

"We think the lower court's construction of the contract was entirely correct. The first paragraph thereof, standing alone, confers upon appellant an option to purchase the premises for $10,000, during the term of the lease, but the second paragraph limits or modifies the preceding paragraph. Upon the notice to appellant by the Bishop of a bona fide prospective sale, and upon its being given the opportunity to exercise its option to purchase the property at the same price offered, and the appellant's refusal to purchase, the first paragraph of the option-agreement lapsed. Thereafter appellant's remaining rights were under the second paragraph. Appellant's right to purchase the leased premises for $10,000 terminated with its writing of the letter dated August 15, 1940, advising the Bishop of its election not to accept his offer to sell the premises.

The provision in the second paragraph above quoted, giving the lessee the privilege of purchasing the property from a subsequent owner on the same terms as such owner might be offered, does not authorize or permit appellant to purchase the leased premises from the present owner for $10,000 if it so elects, but simply gives it the privilege of buying at a price that may be offered the present owner if the present owner desires to sell. The last sentence under paragraph 2 of the lease-contract, above quoted, does not refer to rights under paragraph 1 but only to future options and to the lease estate itself."

On February 17, 1959, in the Appellate Court of Illinois in the case of Northwest Racing Association v. William Hunt and Virginia Daley, Executors of the Last Will and

Testament of George E. Hunt, deceased, 20 Illinois Appeals 2d 393, there was a suit for the construction of a lease with the dual option agreement. The lower court decided this case in favor of the lessor and the Appellate Court of Illinois affirmed. The Court said:

> "Where there were two options to purchase in a lease each susceptible of interpretation as consistent with each other and plaintiff's right in first option was subject to right of lessors to sell to a third party and lessor fixed right of parties by selling under second option, plaintiff having failed to exercise its right under second option lost its right to purchase under either option in the lease by reason of its failure to meet offer of the purchaser under second option.
> When lessee is given the first privilege of purchasing the premises, he must after notice from lessor of the receipt of the bona fide offer elect to exercise his privilege in accordance with the terms of the lease or the right is lost."

The Plaintiff in this cause relied on two points in contending it had a right to purchase said property at the fixed price in the first option and it also contended that the sale to Daley was voidable because Daley was the spouse of one of the coexecutors. The Court, in rejecting the plaintiff's contention, said that neither was tenable. The Court further said:

> "Where lease contained two options to purchase and plaintiff's right in the first option was subject to an equally effective right of the lessors to sell to a third party and lessors fixed the rights of the parties by selling under the second option, sale to the third party was not voidable at the option of plaintiff because it was in fact a sale to a nominee of one of coexecutors of lessor."

On February 12, 1963, the Supreme Court of Iowa in the case of Imperial Refineries Corporation v. Lila Moris-

say, 119 S. W. 2d 872, had the dual option question, but the Supreme Court of Iowa in reversing the lower court held that the lessee, who had both an option to purchase for a mutually satisfactory price not to exceed $22,000.00 and a first refusal option, had waived the first option, and that the lessor, by notifying lessee of receiving a bona fide $45,000.00 offer from a third party, had thereby offered to sell to lessee, under lessee's first refusal option, for $45,000.00, and that the lessee had accepted.

On March 8, 1963, the Supreme Court of Errors of Connecticut in the case of Texaco, Inc. v. Louis B. Rogow, 190 Atlantic Reporter 2d 48, the question of dual option was presented to the Court with the lessee asking for specific performance on the fixed price option, and a counterclaim of the lessor asking for specific performance on the first refusal option. The lower court denied specific performance in each instance, and the Supreme Court of Errors of Connecticut affirmed. This is possibly the latest case dealing with the dual option and seems to clearly set out what the law is in construing this type of contract. In April of 1959, the defendant (lessor) decided to accept an offer which had been made to him by Albert N. Spaien to purchase the leased premises for $44,000.00. The defendant mailed the necessary notice to the plaintiff, setting forth that he desired to accept the offer. The plaintiff claims that it wrote a letter to the defendant dated May 4, 1959, wherein it exercised its fixed price option.

After a formal demand on the defendant for a conveyance at the fixed price option of $16,000.00 which the plaintiff made on May 14, 1959, and a formal tender of the $16,000.00 made on September 3, 1959, both of which were refused by the defendant, the plaintiff, on September 23, 1959, instituted suit. The Court concluded that the plaintiff lost its right to purchase at the fixed price when it failed to exercise its first refusal option

within 30 days after receipt of the notice of April 29, 1959. In denying specific performance to both the lessor and the lessee, the court had the following to say:

> "The plaintiff's interpretation of the provisions in question would, solely by implication, wholly subordinate the first refusal provision of the fixed price option. This interpretation is reached in the absence of any language in the lease expressive of any such intention and would render virtually inoperative the provision expressly according the defendant the unrestricted opportunity to attempt to obtain the fair value of the property during the first nine years. There is no language whatever in the lease indicative of any intention other than that the first refusal provision was the only one under which the plaintiff could purchase the property during the first nine years and that, after that period, the first refusal provision was one of two option provisions, each of which was on a parity with the other. Under the circumstances, it would be unreasonable to hold that, if a lessee is given notice of any offer and refuses to exercise a first refusal option under paragraph 9 (b) it can thereafter, at any time after the first nine years, purchase the property at $16,000.00 despite a prior sale of it to the offeror named in the notice.
>
> A term not expressly included will not be read into a contract unless it arises by necessary implication from the provisions of the instrument. Ives v. Williamantic, 121 Connecticut 408, 411, 185 A. 427; Connecticut Co. v. Division 425 of Amalgamated Ass'n. of Street, etc., 147 Conn. 608, 621, 164 A. 2d 413. Also, if the terms of an instrument are fairly susceptible of two or more interpretations, the one which is the more equitable, reasonable and rational is to be preferred. Peoples v. New England Lumber &

Box Co., 107 Conn. 724, 726, 142 A. 387; Hamden Holding Corporation v. United Men's Shops, Inc., 127 Conn. 500, 502, 18 A. 2d 356. Furthermore, words in an agreement must be accorded their common meaning and usage where they can be sensibly applied to the subject matter of the contract.

The agreement as a whole must be considered, and each part given effect if possible. Sturtevant v. Sturtevant, 146 Conn. 644, 647, 153 A. 2d 828, 79 A. L. R. 2d 604. These rules cannot be rendered ineffective in this case by the general rule that, where there is an ambiguity, the lessee is favored—a rule recognized in such cases such as Connecticut Land & Mortgage Co. v. Lesser, 136 Conn. 580, 583, 72 A. 2d 805, and Ingalls v. Roger Smith Hotels Corporation, 143 Conn. 1, 6, 118 A. 2d 463. This general rule does not mean that any solution of a claimed ambiguity, if proposed by a lessee, should prevail.

Applying, as we must, the foregoing rules of interpretation, it becomes clear that the plaintiff's claims are in violation of them and must fail. It is also clear that the correct application of these rules supports the result reached in the court below. The plaintiff's fixed price option could be effectively exercised only after the first nine years of the term, and then, practically speaking, only prior to the plaintiff's receipt of a notice from the defendant of the Spaien offer and of the defendant's desire to accept it. Thereupon, the fixed price option was rendered ineffective and could not be exercised even after the close of the ninth year, and the plaintiff had to accept the first refusal offer, as provided in the lease, or risk losing the right to purchase the property thereafter. Shell Oil Company v. Blumberg, 154 F. 2d 251, 252 (5th Cir.); Adams v. Helburn, 198 Ky. 546, 548, 249 S. W. 543; 1 Corbin, Contracts

(1950), No. 261, p. 864. It makes no claim that it attempted to exercise the first refusal option. Since the Plaintiff did not, and, as it concedes, could not, exercise its fixed price option during the first nine years of the lease, and since notice giving it the first refusal option was given during that period and indeed, prior to the plaintiff's attempted exercise of the fixed price option, judgment was properly rendered for the defendant on the complaint."

It is called to the Court's attention that in the above cases which have been discussed, it is important to note that the lessor gave notice first to the lessee of its intention to sell to a third party, and thereby, fixed the rights and obligations of the parties to the lease.

The following cases were decided by the Courts in favor of the lessee, but can be easily distinguished from the above cases holding in favor of the lessor.

Butler et al. v. Richardson, 60 Atlantic 2d 718, was decided by the Supreme Court of Rhode Island in August of 1948. The lease in this case was for a period of one year, and while it had a dual option provision, the terms of the lease clearly indicated that the lessee was to have a full year in which to determine whether or not he wanted to purchase the property under the fixed price option of $15,000.00. The lease even provided that if the lessee elected to exercise the fixed price option that the rent payments paid to date would apply against the purchase price. The lessor during the year advised the lessee that a third party was interested in purchasing the premises, but did not inform the lessee of the terms of the offer, and the lessee was not obliged to act on the notice because it was not in compliance with the requirements of the lease. The Court in deciding this case came to the conclusion that the first refusal option in the lease only applied when the third party's offer was less than the fixed price option. The lessee in this case, after re-

ceiving the letter from lessor notifying him of a third party's interest, wrote the lessor's agent, Mrs. Hill, and asked what amount they should send to bind the deal, and Mrs. Hill replied and suggested $500.00. The lessee promptly sent their check for this amount and the Court correctly held that the lessee had, with the consent and approval of the lessor, exercised their fixed price option.

On January 9, 1949, The Supreme Court of Texas in the case of Sinclair Refining Company, et al. v. Allbritton, et al., 218 S. W. 2d 185, had the question of dual option and decided the case in favor of the lessor.

On appeal to the Court of Civil Appeals in Texas, the District Court's opinion was affirmed with Judge Tirey writing a very strong dissenting opinion. The Supreme Court of Texas reversed the District Court and the Civil Court of Appeals and decided the case in favor of the lessee in accord with Judge Tirey's dissenting Opinion in the Court of Civil Appeals.

Your petitioner in this case, Mrs. Prescott, is in complete accord with the Texas Supreme Court's decision and Judge Tirey's Dissenting opinion. In this case, the lessee gave notice to the lessor that it desired to exercise its fixed price option, and when the lessor received this notice, the lessor contended that it had thirty days in which to go out in the open market and try to find a purchaser who would pay more than the fixed price option. The Court correctly held that when the lessee elected to exercise its fixed price option, the rights and duties of the parties were then and there fixed. The Court in this case said further that it was not prepared to follow the Butler v. Richardson case, supra, to the extent of limiting lessor's rights under a purchase refusal article in such circumstances, to third party's sales below the fixed price option.

In the instant case Shell Oil Company had nearly twenty-five years in which to exercise its fixed price

option, and Mrs. Prescott does not dispute Shell's right to exercise its fixed price option if same was done prior to her receiving a bona fide offer from a third party. When you apply the law as set out by the Supreme Court of Texas in the Allbritton case, supra, and the other cases cited by the petitioner, Mrs. Prescott, you must come to the logical conclusion that where dual option provisions are placed in a lease, the party first exercising the option fixes the rights and liabilities of the parties.

On January 4, 1951, the United States District Court, Northern District of Ohio, Eastern Division in the case of Sinclair Refining Company v. Clay, et al., 102 Fed. Supl. 732, had the dual option question and decided same in favor of the lessee. This case differs from the instant case both factually and legally. In that case the lessor had sold this property and presumably the lessee at that time had declined to purchase under the first refusal option. The purchaser from the lessor purchased with actual knowledge that the lessee had a fixed price option and that the lease had some additional time to run. The main distinguishable feature between that case and the case now on appeal is the fact that the lessee gave notice first that it was exercising its fixed price option and the Court correctly held that it had a right to do so.

In the case of Sinclair Refining Co. v. Clay, supra, the Court commented and agreed with the decision in the case of Sinclair Refining Co. v. Allbritton, supra, in that when the purchase option was exercised first, then at that time the rights and obligations were fixed.

On July 28, 1954, the Supreme Court of California in the case of Adams v. Willis, 225 S. C. 518, 83 S. C. 2d 171, in which the question of dual options were involved is a case similar to the Sinclair Refining Company v. Clay, supra, but is entirely distinguishable from the case now on appeal in that the lessee was the one who first exercised its fixed price option.

On March 18, 1966, the petitioner, Mrs. Prescott, received a bona fide offer for the purchase of her property in the amount of $50,000.00. She immediately by registered mail sent the Shell Oil Company a copy of her contract, the names and addresses of the purchasers, and an affidavit from her stating that she was desirous of completing this contract and advised Shell Oil Company that it had twenty-five days in which to decide whether or not it wanted to exercise its right at first refusal.

On April 4, 1966, the Shell Oil Company notified Mrs. Prescott that it did not desire to exercise its first refusal to purchase her property for $50,000.00 but was electing to exercise its option to purchase said property at the fixed price option of $32,500.00. As a result of the letters written by Shell Oil Company to Mrs. Prescott, copies of which were sent to Mr. Van Natta and Mr. Buckingham, and the position taken by the Mid-South Title Company that they could not issue their title policy on this property until such time as the legal questions involved were determined, the prospective purchasers declined to voluntarily go through with their contract to buy said property.

It is the theory of the petitioner, Mrs. Prescott, that when these parties entered into their first lease in 1940, that they both were of the opinion that a fair purchase price for said property was $18,000.00. This was the price that was inserted in the fixed price option, but since this lease was to run for many years, and neither party could foresee the economic future, the right of first refusal was put into the lease to protect both parties. If the property appreciated in value and the lessor had an opportunity to sell the property at a price higher than the fixed price option, the lessee was nevertheless protected, because it had the first right of refusal or the right of purchasing the property at the higher price. However, if during the term of this lease, the economy failed, and the lessor was forced, through economic necessity, to sell the property at a figure much lower than the fixed price option, then the

lessee was nevertheless protected since the lessor would have to give the lessee the first right to purchase at a lower figure. This seems to be a reasonable construction to place upon the lease and give full effect to the entire lease and the intention of the parties. The above reasoning is further borne out by the fact that when the lease expired in 1950, and the parties entered into a new lease; the fixed price option was increased from $18,000.00 to $32,500.00 which should prove conclusively that even the lessee recognized that the property had increased in value. Still neither party could foresee what the economic condition would be in 1966, so they inserted into the lease the first refusal so as to protect both parties as set out above. The lessee, in addition to the above protections had the absolute right to exercise its fixed price option at any time prior to the lessor's receipt of a bone fide offer. In the instant case, the lessee did not elect to exercise its fixed price option until after the lessor had notified the lessee that it had a bona fide offer for the purchase of said property. Then the lessee had the opportunity to purchase the property at the price offered by the bona fide offeror. When the lessee again elected not to purchase the property, surely no court of equity could hold that the lessee could then tell the lessor in effect, "You cannot sell your property, because I have finally decided that I am going to buy it, but not at the price which you have been offered, but at a much lower price." If any court of equity could hold that the lessee had such a right, then surely the court must go further and hold that the paragraph containing the right of first refusal had no meaning whatsoever, and was purely surplusage.

It is the petitioner Mrs. Prescott's position that when she notified Shell Oil Company under paragraph 14 of the bona fide offer of $50,000.00, and of their right of first refusal, that this act fixed the rights of the parties since this act occurred before Shell Oil Company elected to act on the fixed price option in paragraph 13.

The District Court clearly erred in interpreting paragraph "Fourteenth" of the lease so as to limit that option to offers lower than $32,500.00. Clearly paragraph Fourteenth has no such limitation and this limitation should not under the law be read into it.

If this limitation were the intent of the parties, it should have been written in the lease in express terms.

The lease in question was prepared on a Shell Oil Company printed form of lease and should the court find any ambiguity in said lease, it should be construed against the party using said ambiguous language. 51 C. J. S., "Landlord and Tenant," Sec. 232, p. 859.

RELIEF.

Wherefore, your petitioner respectfully prays that this petition for a writ of certiorari be granted, and that this Court's writ of certiorari issue to the United States Court of Appeals for the Sixth Circuit for the purpose of reviewing the questions hereinbefore specified, and that upon review the judgment and decision of the United States District Court for the Western District of Tennessee, Western Division and the United States Court of Appeals for the Sixth Circuit be reversed, and that your petitioner have such other and further relief as this Honorable Court may deem just.

Respectfully submitted,

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